

A deconstruction of the jurisdiction of the CJEU in CFSP matters – enlightenment at the end of the tunnel? (Part 1)

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The judgement of the CJEU in the case [Bank Refah](#) has risen to some prominence lately (see [here](#) and [here](#)) – and rightly so. The “clarification” that the CJEU under [Art 275 para 2 TFEU](#) has not only jurisdiction to hear actions for annulment (Art 263 TFEU) but – in principle – has also jurisdiction to hear an action for damages (Art 268 and 340 TFEU) caused by the adoption of a Common Foreign and Security Policy (CFSP) decisions installing restrictive measures against a natural or legal person is just the latest piece of the puzzle in finding the true realm of the CJEU’s jurisdiction in CFSP matters. Ever since its [infamous Opinion 2/13](#), in which the CJEU “teasered” that *“the Court has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters”* European lawyers have been eagerly awaiting enlightenment on how to overcome the seemingly insurmountable obstacle that there could be no accession of the EU to the ECHR if the ECtHR jurisdiction is wider than the CJEU’s – supposedly – limited jurisdiction in CFSP matters.

Previously on the CFSP Case Law

On the substance, the *Bank Refah* judgment, relating to damages allegedly incurred by an Iranian Bank sanctioned in the wake of the EU’s attempt to hamper Iran’s nuclear activities, follows in the footsteps of [Rosneft](#) (discussed [here](#) and [here](#)), [Elitaliana](#), [H](#) (discussed [here](#) and [here](#)) and [SatCen](#). The CJEU’s expansionary tendencies with regard to the scope and the available proceedings that can be

instigated against CFSP acts indeed seems reflective of an evolving realization that the entanglement of EU institutions in the coordination and shaping of CFSP must go hand in hand with a complete system of legal remedies and procedures. In fact, ever since the *Kadi*-saga that ultimately brought about the changes to the Treaties provided for in Art 275 para 2 TFEU the case law of the CJEU seems to be driven by the understanding that the CFSP, after all, is part of EU law and thus subject to the guiding principle that the EU as a whole is a community based on the rule of law (see e.g. AG Bobek in *SatCen*). Relying on this overarching constitutional conception, it seems only forthright that the limitations to the CJEU's jurisdiction set out in Art 275 TFEU ought to be interpreted narrowly.

The ultimate question of whether or not any CFSP matter that touches upon individual rights is subject to some sort of judicial review by the CJEU, however, has not been answered definitely. So far, the case law merely provides either for an extension of proceedings that can be instigated against CFSP acts that are reviewable under Art 275 para 2 TFEU – i.e. “restrictive measures against natural or legal persons” – (*Rosneft* and *Bank Refah*) or the legal review of actions that while adopted within the realm of the CFSP are not covered by Art 275 para 2 TFEU but are by their substance – in the words of AG Bobek – “[normal administrative acts](#)”. These latter cases (*Elitaliana*, *H*, *SatCen*) relate to internal issues such as procurement procedures and staff regulations that are in principle indistinguishable from acts taken in other, integrated policy fields of the EU.

Addressing the elephant in the room

Yet, the decisions and actions taken within the CFSP, arguably, go beyond these types of reviewable acts. [Schmalenbach in a recent contribution to the Festschrift für Hubert Isak](#) has indeed pointed out that the EU's civilian and military overseas missions established within the context of the CFSP and the Common Security and Defence Policy (CSDP) in particular are problematic. From the point of view of the EU's accession to the ECHR they, in her words, indeed have to be viewed as the “*proverbial elephant in the courtroom during the proceedings of 2/13*”. While the ECtHR has been ever-expanding its jurisdictional reach against extraterritorial human rights violations in the context of military missions (discussed [here](#)) the CJEU's jurisdiction is, despite its expansionary CFSP case law – purportedly – still insufficient to adjudicate in these cases. The limited jurisdiction of the CJEU in these matters thus bodes ill for the prospect of an EU accession to the ECHR, premised on the concept of a congruent jurisdictional reach.

To overcome this comparatively insufficient human rights jurisdiction several ideas have been floated, including the (politically and/or legally) rather hopeless suggestions of attaching a CFSP specific reservation to the EU's ECHR accession treaty, limiting the ECtHR's jurisdiction, or, conversely, amending the EU Treaties themselves, in order to establish a planetary jurisdiction for the CJEU also within the CFSP. A subtler and at least *prima facie* more promising idea proposes to create a mechanism for the re-attribution of human rights responsibilities to all or any member state. By enshrining such an attribution-clause in a decision establishing an EU overseas mission any respective violation of the ECHR, so the thinking goes, would

fall on the “willing” member state(s). However, *Schmalenbach* has rejected any such circumventive approach. And undeniably, the argument that any EU-internal clause, establishing that all or any member state are to be held responsible for human rights violations committed within the context of CDSP overseas missions cannot overwrite the external rules of attribution as derived from Art 7 ILC [Draft Articles on the Responsibility of International Organizations](#) (see on the issue attribution in the context of the ECHR also the ECtHR’s judgment in [Jaloud/Netherlands](#); and the discussion [here](#)), seems impeccable.

That said, there is also another way to – possibly – overcome these jurisdictional incongruences. And indeed, the only thing required is to unravel certain beliefs about the very nature of the CFSP.

The second part of this blogpost can be found [here](#). I am very grateful to Lisa Kirchengast for her support and her most valuable input.

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